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BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONERS

KRISTIN K. MAYES, Chairman
GARY PIERCE
PAUL NEWMAN
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BOB STUMP

IN THE MATTER OF THE APPLICATION OF
JOHNSON UTILITIES, LLC DBA JOHNSON
UTILITIES COMPANY FOR AN INCREASE
IN ITS WATER AND WASTEWATER RATES
FOR CUSTOMERS WITHIN PINAL
COUNTY, ARIZONA.

DOCKET NO. WS-02987A-08-0180

STAFF'S BRIEF REGARDING
ADMISSIBILITY OF
ASHTON TRANSCRIPT

I. INTRODUCTION.

On April 26, 2009, Administrative Law Judge Wolfe directed Johnson Utilities LLC ("Johnson") and Swing First Golf LLC ("Swing First") to file briefs discussing the admissibility of a transcribed audio-recorded conversation ("transcript") between David Ashton, the managing partner of Swing First, and Gary Larsen, an employee of Johnson. (Hrg. Tr. 352:11-18, Apr. 27, 2009.) Because Johnson expressed that the transcript may be confidential, Judge Wolfe stated that it would be kept under seal and ordered it to be treated as confidential until its admissibility had been determined. (Hrg. Tr. 353:3-5.) Johnson also asserted that introduction of the document into evidence was problematic because of due process concerns (Hrg. Tr. 340:15-19, 341:13-14, 346:7-14) and because it is hearsay (Hrg. Tr. 341:15).¹ Judge Wolfe offered the other parties, including the Arizona Corporation Commission Staff ("Staff"), an opportunity to submit briefs regarding the admissibility of the transcript. (Hrg. Tr. 355:23-356:2.) Through its confidentiality agreement with Johnson, Staff obtained a copy of the transcript and hereby submits its brief addressing the admissibility and confidentiality of the transcript.

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¹ Staff notes that if introduction of the transcript did raise due process concerns, those concerns have been obviated by the period of time that the parties have now had to review the transcript.

1 **II. DISCUSSION.**

2 The transcript should be admitted as evidence in this matter because it is relevant to Swing
3 First's allegations, it is not hearsay, and it was legally obtained. Furthermore, the transcript should
4 not be treated as confidential.

5 **A. The Transcript Is Admissible Because, It Is Relevant to Swing First's Allegations,**
6 **It Is Not Hearsay, and It Appears to Have Been Obtained Legally.**

7 **1. The transcript is relevant to Swing First's allegations.**

8 Relevant evidence is generally presumed admissible. Ariz. R. Evid. 402. Evidence is
9 relevant if it has "any tendency to make the existence of any fact that is of consequence to the
10 determination of the action more probable or less probable than it would be without the evidence."
11 Ariz. R. Evid. 401. In this case, Swing First has alleged, among other things, that Johnson has
12 engaged in improper billing and delivery practices. (Ashton Dir. Test., Exec. Summ., Mar. 2, 2009.)
13 While much of the transcript is unclear, a number of statements made in the transcript do relate to
14 Swing First's allegations and would tend to make the existence of these allegations more or less
15 probable. (See e.g., Ashton Tr. 5:9-10, 22:19-21, 31:4-6, 44:20-22, 51:18-21, Feb. 1, 2008.)
16 Therefore, the transcript is relevant.

17 **2. The transcript is not hearsay.**

18 A "statement [that] is offered against a party and is . . . (D) a statement by the party's agent or
19 servant concerning a matter within the scope of the agency or employment made during the existence
20 of the relationship" is not hearsay. Ariz. R. Evid. 801(d)(2). Because (1) Mr. Larsen is an agent or
21 servant of Johnson Utilities, (2) the statements made in the transcript concern a matter within the
22 scope of his employment (billing and delivery practices), and (3) the statements were made at a time
23 when Mr. Larsen was an employee of Johnson Utilities, the statements are not hearsay if offered
24 against Johnson Utilities.

25 **3. The recording appears to have been legally obtained by Mr. Ashton.**

26 A party to a private conversation may record the conversation without the consent of another
27 party to the conversation. A.R.S. §§ 13-3005 and 13-3012, *State v. Allgood*, 171 Ariz. 522, 523
28 (Ariz. Ct. App. 1992) ("Monitoring and recording of a telephone conversation with the consent of

1 one party, sometimes referred to as 'participant monitoring' or 'consent surveillance,' is authorized
2 by statute in Arizona.""). Since, clearly, the recording was made with Mr. Ashton's consent, the
3 recording was not done unlawfully.

4 **B. The Transcript Should Not Be Treated as Confidential.**

5 Staff obtained a copy of the transcript pursuant to the confidentiality agreement entered into
6 between Staff and Johnson. The confidentiality agreement provides a process by which staff may
7 dispute the confidential nature of information provided pursuant to the agreement. The agreement
8 states that information which Johnson "alleges may be of a proprietary, confidential, or legally
9 protected nature . . . shall not be disclosed [or] made a part of the public record in this docket . . .
10 unless Staff provides [the] Company five (5) business days written notice that information designated
11 by the Company as Confidential Information shall be subject to disclosure as a public record." The
12 agreement goes on to state, "Upon the expiration of five (5) business days from the date written
13 notice is received by Company, any Confidential Information identified in the notice as subject to
14 disclosure shall become part of the public record in this docket, unless Company initiates a protective
15 proceeding under the terms of this Agreement." Staff hereby provides Johnson notice that Staff does
16 not believe the information contained in the transcript is of a proprietary, confidential, or legally
17 protected nature and that upon the expiration of five (5) business days from Johnson's receipt of this
18 pleading, the transcript, which was designated by the Company as confidential information, shall be
19 subject to disclosure as a public record (unless the Hearing Division directs otherwise).

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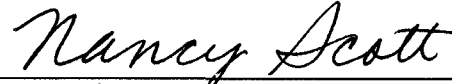
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1 **III. CONCLUSION.**

2 In conclusion, the transcript should be admitted as legally-obtained, relevant, non-hearsay
3 evidence. Additionally, Staff notifies Johnson that the transcript is not of a proprietary, confidential,
4 or legally protected nature, and therefore should not be treated as confidential.

5 RESPECTFULLY SUBMITTED this 22nd day of May, 2009.

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